



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Bruce Lurye for Water Quality
Certification to Fill a Wetland in the City of
Superior, Douglas County, Wisconsin

Case No.: 3-NO-99-16003

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Bruce Lurye filed an application with the Department of Natural Resources for water quality certification pursuant to Section 401, Federal Clean Water Act, and ch. NR 299, Wis. Adm. Code, seeking authorization to place fill material in a wetlands located in the City of Superior. By letter dated April 15, 1999, the Department of Natural Resources denied the application. On May 13, 1999, Mr. Lurye filed with the Department of Natural Resources a request for a contested case hearing pursuant to sec. 227.42, Stats. On November 8, 1999, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice a hearing was conducted on March 22, 2000, in Superior, Wisconsin, Mark J. Kaiser, Administrative Law Judge, presiding. The parties filed written argument after the close of the hearing. The last brief was received on April 28, 2000. On June 5, 2000, Mr. Lurye submitted an additional letter enclosing a copy of recently enacted Wisconsin Act 147 in support of his application.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Bruce Lurye/Edwards Realty and Finance Co., Inc., applicant, by

Attorney Michael J. Milliken and
Attorney David A. Kropid
1214 Belknap Street
Superior, WI 54880

Wisconsin Department of Natural Resources, by

Attorney Michael D. Scott
P. O. Box 7921
Madison, WI 53707

FINDINGS OF FACT

1. Bruce Lurye is president of Edwards Realty and Finance Co., Inc., (throughout this decision Mr. Lurye and Edwards Realty will be collectively referred to as “Lurye”). Lurye owns the majority of an approximately 1.5 acre parcel of property in the City of Superior. The property is bounded by Lamborn Avenue on the east, by 32nd Street on the north, by 33rd Street on the south, and by an unimproved alley on the west. The legal description of the parcel is the North ½ of Section 26, Township 49 North, Range 14 West, City of Superior, Douglas County, Wisconsin.

2. The parcel is platted as fourteen lots. The lots are each approximately 25 feet wide and 150 feet deep. Lurye owns lots one through six and nine through fourteen. Lots seven and eight are owned by Douglas County. A portion, .97 acres, of the parcel is classified as wetlands. Lurye proposes to fill .36 acre of the wetlands on the lots he owns for the purpose of constructing four single-family homes. The area to be filled consists of the footprint of the four homes and a driveway for each home.

3. On December 31, 1998, C. Robert Inglimo, as an agent for Lurye, submitted an application to the Wisconsin Department of Natural Resources (Department) for water quality certification (Exh. 20). The application seeks authorization to place fill material in the wetlands for the proposed construction of the four homes. On April 15, 1999, the Department notified Mr. Inglimo that the application for water quality certification for the proposed project was denied. On May 13, 1999, Lurye filed a petition a contested case hearing to review the Department’s denial (Exh. 22). (The original application for water quality certification sought authorization to fill the entire .97 acres of wetlands. On February 24, 1999, Lurye filed an amended application citing an alternative proposal that involved filling only .36 acres of the wetlands. The amended proposal is the application that is being considered in this decision.)

4. The subject property is characterized by mottled topsoil ranging from two inches to twelve inches deep overlaying wet red clay. The layer of red clay in this area is approximately 200 feet thick. The vegetation on the property is predominantly lawn grasses on the western portion of the property and hydrophytic herbaceous plants on the eastern portion. West of the subject property (or the other side of the unimproved alley) a row of single family homes have been constructed. It is apparent the owners of these homes have mowed and are using the area of the unimproved alley and the western portion of the subject property.

5. Utilities, including sewer, water, gas, and electricity, are already in place to serve these properties. The frontage of the subject property along Lamborn Avenue is ditched and City storm sewers have been extended to the northeast corner of the property. Lurye submitted evidence at the hearing indicating that he has invested \$67,471.70 to develop these properties for building (Exh. 21).

6. The area south and east of the subject property is part of the Superior airport reserve. This area is also classified as wetland. A portion of this wetland was recently filled to accommodate a landing strip extension.

7. The purpose of the proposed filling, the development of four residential building sites, is not a wetland dependant activity.

8. Although the proposal is to fill only .36 acres for the development of the four residential building sites, once the homes are constructed, presumably most of the wetland vegetation will be replaced with traditional lawns. Accordingly, the proposal will result in the elimination of the entire .97 acres of wetlands.

9. The subject wetlands provides habitat for songbirds, red-winged blackbirds, and small fur bearing mammals. The wetlands also are potentially used as a travel corridor for other animals such as deer. The proposed project will adversely impact the wetlands functional value as habitat for residential and transient wildlife.

10. The layer of red clay soil beneath the topsoil of this wetland prevents the transmission of soil water from the wetland to the groundwater or the discharge of groundwater into the wetland. The subject wetland has no functional value with regard to hydrologic functions.

11. As discussed above the frontage of the property along Lamborn Avenue has been ditched. The ditch carries stormwater towards the city's storm sewer. The property has little standing water and has minimal functional value for stormwater retention and filtration or storage of sediments. The Department presented testimony that wetland vegetation holds moisture which is discharged into the atmosphere through evapotranspiration. Constructing four homes and driveways will reduce the amount of wetland vegetation in this area and accordingly will proportionally reduce the amount of moisture held by the vegetation. To that extent the proposal will negatively impact the functional value of the wetland with regard to stormwater retention. However, this impact does not appear to be significant.

12. The subject wetland has potential to be developed for recreational, cultural, educational, scientific or natural aesthetic uses. However, as the wetland currently exists it does not provide any of these functional values to a significant extent.

13. The subject wetland parcel is not adjacent to any waterway and; therefore, does not provide any functional value for shoreline protection. The wetland does not have any permanent standing water and; therefore, does not provide any habitat for aquatic organisms.

14. A practicable alternative for the proposed activity, construction of single family homes, does exist. The alternative is to acquire other residential lots upon which to build. Although this practicable alternative exists, the evidence presented at the hearing is that the demand for buildable lots within the corporate limits of Superior exceeds the available supply.

15. The City of Superior has a wetland mitigation program. Developers may obtain a city wetland fill permit by purchasing a comparable amount of mitigation property for wetland replacement purposes. On February 26, 1999, the City of Superior, Public Works Department issued a letter of intent to Lurye indicating that the city had agreed to sell an acre of mitigation

property to him as replacement for the .97 acre of wetland which would be lost as part of the proposed project (Exh. 35).

Discussion

Lurye has applied for water quality certification pursuant to ch. NR 299, Wis. Adm. Code, for the purpose of placing fill in a wetland. The purpose of placing the fill in the wetland is to develop four buildable sites for single family homes. Pursuant to sec. NR 103.06(1)(c), Wis. Adm. Code, water quality certification is subject to the requirements of ch. NR 103, Wis. Adm. Code. Section NR 103(4)(a), Wis. Adm. Code, requires the Department to make a finding that the requirements of ch. NR 103, Wis. Adm. Code, are not satisfied when it determines that:

- 1) An activity is not wetland dependent and the surface area of the wetland impact, which includes impacts noted in sec. NR 103.08(3), is greater than 0.10 acres, and
- 2) A practicable alternative exists which will not adversely impact wetlands and will not result in other significant, adverse environmental consequences.

Lurye admits that the activity, the construction of single family homes, is not a wetland dependent activity. Lurye also does not dispute that the surface area of the wetlands that will be impacted is greater than 0.10 acres. Accordingly, there is no dispute that the proposed project does not meet the conditions of sec. NR 103.08(4)(a)1, Wis. Adm. Code.

Although the evidence in the record is that there is a shortage of buildable residential lots in the City of Superior, the practicable alternative of acquiring other lots to build single family homes does exist. Accordingly, the conditions of sec. NR 103.08(4)(a) are not met and the requirements of ch. NR 103, Wis. Adm. Code are not satisfied.

As discussed in the Findings of Fact, most of the functional values or uses of wetlands listed in sec. NR 103.03(1), Wis. Adm. Code, are not applicable to this wetland. However, the subject wetland does provide habitat for resident and transient wildlife species and the proposed filling of the wetland and construction of homes on this property would eliminate this functional value of the wetland. Mike Goetell, the Department's water management specialist, also testified that the subject wetland does provide some stormwater storage, although it is difficult to say that this stormwater storage is significant. At least with respect to the destruction of wildlife habitat, the proposed project will have a significant adverse impact on the wetlands.

The proposed project, although it will only involve filling .36 acres of the .97 acres of wetlands will impact and essentially eliminate the entire wetlands. The importance of protecting and preserving wetlands is well documented. However, it should be noted that due to the thick layer of red clay subsoil in this area, wetlands are prevalent throughout the Superior area. The testimony at the hearing was that virtually all undeveloped lots within the City of Superior are classified as wetlands. Accordingly, it is virtually impossible to build any new homes within the city limits of Superior without impacting any wetlands.

In recognition of the unique problems the City of Superior has in developing new residential or commercial properties because of the extensive existence of wetlands, the City, the Army Corps of Engineers, and the Department developed the Superior Area Management Plan (SAMP). The SAMP identified areas within the City of Superior where regulated wetland fill and development was possible. The Lurye property is not a wetland that was designated by the SAMP. Additionally, the City of Superior has also developed a wetland mitigation program. Developers can "purchase" wetlands to be developed as a replacement for wetlands that are filled.

The details of this wetland mitigation program are not in the record of this matter; however, Lurye's property has been approved for wetland mitigation by the city. At this time, there is no provision in the Wisconsin Statutes to consider wetland mitigation. After the close of the hearing, Lurye filed a copy of recently enacted Wisconsin Act 147, amending sec. 23.321, Stats. The amendments to sec. 23.321, Stats., allow the Department to consider mitigation in processing water quality certification applications. However, the effective date of this amendment is August 1, 2001. Accordingly, it is not applicable to the current application.

In summary, although the Department did not show that the subject wetlands provides many of the functional values associated with wetlands, this wetlands does have significant function value as wildlife habitat. The proposed project will adversely effect this wetlands functional value as wildlife habitat. Lurye has not satisfied his burden of proof to show that the requirements of Ch. NR 103, Wis. Adm. Code have been satisfied. Lurye is willing and able to mitigate the loss of wetlands by purchasing replacement property through the City of Superior's wetland mitigation program; however, the Department can not consider mitigation in evaluating an application for water quality certification at this time. Accordingly, the Department's denial of his application for water quality certification must be affirmed.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats., and sec. NR 299.05(6), Wis. Adm. Code.

2. The proposed fill for residential development is not a wetland dependent activity within the meaning of secs. NR 103.07(2) and NR 103.08(4)(a)(1), Wis. Adm. Code because construction of residential housing is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

3. Practicable alternatives to the proposed fill exist which will not adversely impact wetlands and will not result in other significant environmental consequences. See, sec. NR 103.08(4)(a)(2), Wis. Adm. Code. Practicable alternatives means available and capable of being implemented taking into consideration cost, available technology and logistics in light of overall project purposes. Sec. NR 103.07(1), Wis. Adm. Code. The practicable alternative in this case is to acquire other lots on which to construct residential housing.

4. The project does not meet the requirements of ch. NR 103, Wis. Adm. Code because the project is not wetland dependent and because practicable alternatives exist which will not adversely impact wetlands and will not result in significant adverse environmental consequences. Sec. NR 103.08(4)(a), Wis. Adm. Code.

5. Additionally, the proposed project would result in the violation of the standards contained in secs. NR 103.08(3)(b) to (f), Wis. Adm. Code. Specifically, the proposed project would violate sec. NR 103.08(3)(c) Wis. Adm. Code, relating to the maintenance and protection of wetland functional values described in sec. NR 103.03(1) Wis. Adm. Code, because the proposed project will adversely impact the functional value of the subject wetlands as wildlife habitat.

ORDER

IT IS HEREBY ORDERED, that the application of Bruce Lurye for water quality certification is DENIED.

Dated at Madison, Wisconsin on June 20, 2000.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By _____
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE